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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL KARL KUEHNER,
Appellant,

v.

BRENDA WALLACE KUEHNER,
Respondent.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 18-3-01270-7
The Honorable Stephanie Arend
Presiding Judge

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A. ASSIGNMENT(S) OF ERROR

- I. **The Pierce County Superior Court committed reversible error when it awarded attorneys' fees to Respondent Brenda Kuehner in its Order of October 12, 2020 without any showing of proof or written documentation of any kind evidencing what, if any, attorney's fees were reasonable.**

Issues Pertaining to Assignments of Error

Whether the lower Court's ruling is in contradiction to existing Washington state law and case precedent and whether the lower Court committed reversible error when it awarded attorneys' fees to Respondent Brenda Kuehner in its Order of October 12, 2020 without requiring any showing of proof as to what those specific fees should be, without allowing Plaintiff/Appellant Michael Kuehner to have an opportunity to dispute the validity of those fees, and without any written documentation of any kind evidencing any itemization and what, if any, attorney's fees were reasonable?

B. STATEMENT OF THE CASE

On October 12, 2020, the Pierce County Superior Court ordered the Petitioner/Appellant, Mr. Michael K. Kuehner, to pay \$20,000 of Ms. Brenda Kuehner's attorney's fees. In making this award of attorney's fees,

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without written proof, itemization, or documentation of any kind, the Pierce County Court committed reversible error (CP 8-10).

C. **ARGUMENT**

On October 12, 2020, the Pierce County Superior Court ordered the Petitioner/Appellant, Mr. Michael K. Kuehner, to pay \$20,000 of Ms. Brenda Kuehner's attorney's fees. In making this award of attorney's fees, without written proof, itemization, or documentation of any kind, the Pierce County Court committed reversible error (CP 8-10).

Petitioner then moved the Pierce County Court for an Order of Reconsideration.

On December 09, 2020, the Pierce County Superior Court denied the Petitioner's Motion for Reconsideration (CP 18-19).

Appellant avers that while a request for attorney's fees was included in Respondent's Motion to Vacate, she did not request fees related to the Motion to Vacate. Instead, the request was for an amorphous:

"We're asking for a finding of intransigence and fraud and to award her the outstanding fees for her prior attorneys and the additional \$100,000 to support her moving forward." (RP 14)

In Respondent's Declaration in support of her request for attorney's fees, she specifically sought attorney's fees and costs "to prepare for trial."

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The stated basis of her request for attorney's fees was *forward-looking*. The attorney's fees being requested weren't for actual fees paid, but for fees not yet assessed!

Neither Brenda Kuehner nor her attorney provided any fee declaration or any accounting of fees and costs allegedly incurred by Respondent in pursuing the motion to vacate, which was only partially successful. Indeed, the request for attorney's fees was not based on the motion to vacate. Instead, it was based on the alleged need to conduct additional discovery regarding alleged claims, which the Pierce County Superior Court rejected.

The Pierce County Superior Court was clear that its "sole basis" for its Order of October 12, 2020, was the Appellant's answer to the Complaint in the Florida lawsuit against the Petitioner/Appellant.

The Appellant avers that the Respondent's own request for fees does not support this Court's award of \$20,000 to "*the respondent's attorneys who shall apply it to respondent's fees and costs she has accrued for this motion.*" (CP 15) No reasonable person pays \$20,000 for one motion.

It is incumbent upon the party seeking fees to not only plead and **prove** the amount, but for the court to determine the reasonableness of fees submitted. Indeed, the factors the court is to consider in determining

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the amount of a fee award are set out in *In re Marriage of Knight*, 15 Wn. App. 721, 730, 880 P.2d 71, 76 (1994). Those factors are: (1) the factual and legal questions involved; (2) the time necessary for presentation of the case; and (3) the amount and character of the property involved.

This analysis was not done, given that no proof at all was provided regarding Respondent's attorney's fees. Indeed, it was only during oral argument that Respondent's attorney stated she had incurred \$19,000 in attorney's fees with his firm. Having never seen any billing statements, Petitioner /Appellant was entirely deprived of the ability to review those fees. More to the point, this Court could not possibly have determined those fees to be reasonable without some sort of documentation on which to base its decision.

RCW 26.09.140 allows the Court discretion to award attorney's fees and other costs of litigation, but only when one party has the financial need and the other party has the ability to pay. Since the parties need is a question of fact, the party asserting a request for attorney's fees must provide proof.

Here, Respondent Brenda Kuehner filed no current financial declaration. Instead, she provided vague and ultimately discredited statements regarding Appellant's income. Brenda provided no proof of attorney's fees paid to Mr. Fleury's law firm or of the source of those

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payments. Conversely, Mr. Kuehner provided proof of having paid Respondent \$37,000 pursuant to the CR2A agreement. This fact alone obviates Ms. Kuehner's need for attorney's fees.

Appellant anticipates that Respondent may claim that Mr. Kuehner was intransigent and that such alleged misconduct supports an award of attorney's fees. Washington law is clear; in that situation the attorney's fees awarded should be limited to the amount needed to compensate the requesting party for the other's intransigence. *In re Marriage of Lilly*, 75 Wn. App. 715, 880 P.2d 40 (1994).

Here, the Pierce County Superior Court rejected Brenda Kuehner's claims alleging ineffective assistance of her own counsel; alleged failure to provide discovery; and alleged asset transfers - none of which that Court relied upon in its ruling. Under these circumstances, it was especially incumbent upon Respondent to provide specific proof of attorney's fees actually incurred and/or paid. Instead, Respondent provided no proof whatsoever. Her counsel's statement, made at oral argument with no opportunity for rebuttal, and no documentation in support, fails as a matter of law, as the basis for the lower Court's award of attorney's fees to the Respondent

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D. AUTHORITY AND STANDARD OF REVIEW

I. The Washington courts have long ruled that an award of attorney's fees must be supported with written documentation of those fees.

The Washington State Supreme Court set the standard for awards of attorney's fees in *Mahler v. Szucs*, 957 P. 2d 632 - Wash: Supreme Court (1998).

In Mahler the Washington State Supreme Court Stated that:

“[C]ourts should be guided in calculating fee awards by the lodestar method in determining an award of attorney fees as costs. *Scott Fetzer Co. v. Weeks*, 114 Wash.2d 109, 786 P.2d 265 (1990). The lodestar methodology affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made. Under this methodology, the party seeking fees bears the burden of proving the reasonableness of the fees. *Fetzer*, 122 Wash.2d at 151, 859 P.2d 1210. (Underline for Emphasis)

Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and

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any hours pertaining to unsuccessful theories or claims. Fetzer, 122 Wash.2d at 151, 859 P.2d 1210. Counsel must provide contemporaneous records documenting the hours worked. As we said in Bowers v. Transamerica Title Ins. Co., 100 Wash.2d 581, 597, 675 P.2d 193 (1983), such documentation:

'need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.).'

Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel. Nordstrom, Inc. v. Tampourlos, 107 Wash.2d 735, 744, 733 P.2d 208 (1987).

Consistent with such an admonition is the need for an adequate record on fee award decisions. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. Smith v. Dalton, 58 Wash.App. 876, 795 P.2d 706 (1990); Rhinehart v. Seattle Times, 59 Wash.App. 332, 798 P.2d 1155 (1990); Bentzen v. Demmons, 68 Wash.App. 339, 842 P.2d 1015 (1993); State Farm Mut. Auto. Ins. Co. v. Johnson, 72 Wash.App. 580, 871 P.2d 1066, *review denied*, 124 Wash.2d 1018, 881 P.2d 254 (1994).

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Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.” (Mahler, Id.) (Bold & Underline for Emphasis)

E. CONCLUSION

For the reasons stated above, and as a matter of law, the Pierce County Superior Court erred in awarding attorney’s fees to the Respondent absent written documentation as to the amount and nature of the attorney’s fees and the Appellant asks that this honorable Court reverse the Pierce County Superior Court’s Order of October 12, 2020, and remand this case for further proceedings. This court should also award Appellant his fees and costs expended on this appeal.

DATED this 30th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE/MAILING

I certify that on the 30th day of March, 2021, pursuant to my electronic service agreement with Brenda Kuehner, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following in the manner indicated below:

Respondent/Appellee
Brenda Wallace Kuehner
E-mail to BrendaWallaceKuehner@ICloud.Com

in the manner indicated:

☒ Email: BrendaWallaceKuehner@ICloud.Com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Comments:

Here is the Appellant's Opening Brief after the required corrections as set forth in the Appellate Court's "Letter" dated March 09, 2021.

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